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Supreme Court, U.S.
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No. 04-515

IN THE

Supreme Court of the United States

LARRY BILL ELLIOTT,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
ARGUMENT 1
CONCLUSION 7

TABLE OF AUTHORITIES

Page

Cases

Chawla v. Burgerbusters, Inc., 499 S.E.2d 829 (Va. 1998) 3
Ford v. Georgia, 498 U.S. 411 (1991) 2, 3
Godfrey v. Georgia, 446 U.S. 420 (1980) ..... *passim*
King v. Commonwealth, 570 S.E.2d 863 (Va. 2002) 3
Lowenfield v. Phelps, 484 U.S. 231 (1988) 4, 5
Osborne v. Ohio, 495 U.S. 103 (1990) 4
Ring v. Arizona, 536 U.S. 584 (2002) 6, 7
Stringer v. Black, 503 U.S. 222 (1992) 5, 6
Tuilaepa v. California, 512 U.S. 967 (1994) 4, 5
Walton v. Arizona, 497 U.S. 639 (1990) 5

Statutes and Rules

Va. Code § 8.01-384(A) 3, 4
S. Ct. R. 10(b) 4

REPLY TO BRIEF IN OPPOSITION

The petition demonstrated that this case merits review because (i) the decision below violates *Godfrey v. Georgia*, 446 U.S. 420 (1980), and conflicts with the decisions of other courts applying *Godfrey*, Pet. 13-19; (ii) this case raises an important and recurring question, which will not be resolved without this Court's intervention, Pet. 20-22; and (iii) this Court has jurisdiction over this case, and this case is in fact a good vehicle for considering the question presented because, among other things, petitioner would not have been eligible for the death penalty had narrowing constructions adopted by other states been applied, Pet. 22-26.

The Commonwealth has no real answer to these points. It does not contest most of them. The Commonwealth does not dispute that the decision below conflicts with decisions of other state courts. Nor does it deny that this case presents an important and recurring question, which will not be resolved unless this Court intervenes. The Commonwealth also does not dispute that this case raises the question presented clearly or that petitioner would be ineligible for the death penalty under the narrowing constructions adopted by other states.

Moreover, the Commonwealth's responses to the remaining points made in the petition are unpersuasive. Although it asserts that the procedural default found below deprives this Court of jurisdiction, Opp. 7-13, the Commonwealth does not rebut the petition's showing that this default was based on a procedural rule that is novel, serves no legitimate state interest, and therefore is not adequate to preclude review of a constitutional challenge. The Commonwealth also claims that its vileness aggravator does not violate *Godfrey*, Opp. 13-18, but it fails to undermine the petition's showing that the aggravator directly conflicts with *Godfrey* and its progeny. Thus, the Commonwealth has not cast any doubt upon the petition's demonstration that this case warrants review.

1. The petition demonstrated that the procedural rule invoked below, which requires all pretrial motions to be renewed after a mistrial, is not an adequate state ground for several reasons: petitioner's challenge to the constitutionality of the Commonwealth's vileness aggravator was plainly and reasonably raised, the requirement that pretrial motions be renewed after a mistrial is not a "'firmly established and regularly followed state practice,'" and that requirement does not serve any legitimate state interest. Pet. 23-26 (quoting *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991)). The Commonwealth does not dispute the first point, and it fails to undermine the other two.

a. The Commonwealth does not seriously dispute that the renewal requirement was novel. For example, it does not dispute that the decision below is the first case in Virginia to announce this requirement. Pet. 23. Nor does it dispute that the requirement contradicts the generally accepted rule that pretrial motions need not be renewed after a mistrial. Pet. 24. Finally, the Commonwealth does not dispute that the cases cited below in support of the renewal requirement do not apply that requirement. *Id.*

Instead, the Commonwealth asserts that Elliott understood the renewal requirement because he renewed his "pretrial motions asking for allegedly exculpatory evidence regarding a Commonwealth's witness." Opp. 12. That is simply not true. After the mistrial, petitioner did not renew his pretrial motion for disclosure of exculpatory evidence; he moved for disclosure of *additional* exculpatory evidence. Petitioner filed an eleven-page pretrial motion seeking disclosure of all exculpatory information in the Commonwealth's possession. JA 5-11. After the mistrial, he filed two much shorter motions seeking disclosure of documents that were not revealed until Rebecca Gragg's testimony in the first trial. JA 206-07, 212-14. Thus, as the Commonwealth acknowledged at the time, far from renewing a pretrial motion, the motions filed after the mistrial sought

"*supplemental* exculpatory evidence." JA 232 (emphasis added).

The Commonwealth also suggests that the first trial was not part of the record on appeal. Opp. 12. In fact, the trial court included the entire first trial in the record certified to the Virginia Supreme Court, JA 361-69, and the appendix submitted below contained hundreds of pages from the first trial. JA 1-205.

The Commonwealth suggests as well that Virginia Code § 8.01-384(A) only removes the requirement of making a formal exception "once a contemporaneous objection has been made." Opp. 12. That is incorrect. As previously noted, this provision excuses parties from renewing pretrial motions at trial. Pet. 22 (citing *Chawla v. Burgerbusters, Inc.*, 499 S.E.2d 829, 832-33 (Va. 1998); *King v. Commonwealth*, 570 S.E.2d 863, 866 (Va. 2002)). Moreover, the Commonwealth does not – and cannot – point to anything in this provision that renders it inapplicable after a mistrial. To the contrary, as the petition demonstrated, Pet. 24, Section 8.01-384(A) excuses parties from renewing any objection "known to the court." Va Code § 8.01-384(A). Thus, the Virginia Supreme Court's requirement that pretrial motions be renewed after a mistrial was not only novel; it was also unforeseeable and therefore cannot bar this Court from reviewing petitioner's constitutional challenge. *See, e.g.*, *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991).

b. The Commonwealth has not identified any legitimate state interest in requiring renewal of pretrial motions after a mistrial. It asserts that the Commonwealth has a legitimate interest in requiring parties to bring their objections "to the attention of the trial court *during the trial*." Opp. 13. However, as just noted, parties are not ordinarily required to renew pretrial challenges at trial. *See, e.g.*, *King*, 570 S.E.2d at 866; *Chawla*, 499 S.E.2d at 832-33. As a consequence, the question here is not whether the

Commonwealth has an interest in requiring renewal of pretrial motions at trial – as shown above, Section 8.01-384(A) disclaims any such interest – but rather whether it has an interest in requiring renewal of such motions when there has been a mistrial. The Commonwealth does not identify any such interest. For this reason as well, the renewal requirement is not an adequate ground for precluding review of petitioner's constitutional challenge. *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 123-25 (1990).

2. Although the Commonwealth does not dispute that the instruction given the jury on the vileness aggravator was essentially identical to the jury instruction given in the *Godfrey* case, it nonetheless argues that *Godfrey* is distinguishable and that the vileness aggravator employed in this case was constitutional. Opp. 13-18. Because it is undisputed that the decision below conflicts with decisions of other state supreme courts, and that conflict is by itself sufficient grounds for granting certiorari, *see* S. Ct. R. 10(b), it is not necessary at this stage to address the Commonwealth's merits arguments. In any event, those arguments are meritless.

a. The Commonwealth asserts that *Godfrey* is inapplicable here because the vileness aggravator is "constitutional surplus" under Virginia's capital sentencing scheme. Opp. 14. According to the Commonwealth, under this Court's decision in *Lowenfield v. Phelps*, 484 U.S. 231 (1988), Virginia's definition of capital murder performs the constitutionally required narrowing function. Opp. 14. Virginia has, however, chosen to use the vileness aggravator in the eligibility, not the selection, phase of its capital sentencing procedures, and it must therefore define the aggravator in a clear and definite manner. As the petition pointed out, Pet. at 16 n.4, "the Eighth Amendment requires *both* that the class of persons eligible for the death penalty be narrowed *and* that the jury's discretion be channeled through clear and definite standards." *Tuilaepa v. California*, 512

U.S. 967, 971-73 (1994); *see also Walton v. Arizona*, 497 U.S. 639, 665 n.* (1990) (Scalia, J., concurring in part and concurring in the judgment) ("no matter how narrowly the crime is defined," this Court's decisions "requir[e] aggravating factors to be specified *whenever* the sentencer is given discretion" to determine eligibility for the death penalty).

Nor do the decisions cited by the Commonwealth suggest otherwise. *Lowenfield* did not consider a vagueness challenge; the question before the Court in that case was whether an individual may be sentenced based on an aggravating circumstance that duplicates an element of the underlying crime. *See* 484 U.S. at 241-46. Moreover, far from supporting the Commonwealth's reliance on *Lowenfield*, the Court's decision in *Stringer v. Black*, 503 U.S. 222 (1992), observed that "*Lowenfield* did not involve a claim that a statutory aggravator was ambiguous, and its relevance to *Godfrey* . . . is slight at best." 503 U.S. at 236.

b. The Commonwealth argues that *Godfrey* is essentially limited to its facts. As the Commonwealth would have it, *Godfrey* held the vileness aggravator applied in that case unconstitutional because the sentence there was based "on nothing more than a finding that the offense was 'outrageously or wantonly vile, horrible, and inhuman.'" Opp. 16-17 (quoting *Godfrey*, 446 U.S. at 428 (plurality op.)). That is wrong. *Godfrey* did not rest upon infirmities in the jury verdict; to the contrary, in finding that Georgia's vileness aggravator was unconstitutionally vague as applied, *Godfrey* held that the Georgia Supreme Court had failed to apply a constitutional construction of the depravity prong of the aggravator. *See* 446 U.S. at 429-33 (plurality op.); *see also id.* at 434 (Marshall, J., concurring in the judgment) (joining the Court's conclusion that "no . . . narrowing construction was read to the jury or applied by the Georgia Supreme Court on appeal"). Accordingly, numerous subsequent decisions, both from this Court and from other

states with vileness aggravators, have recognized that *Godfrey* announced a principle extending far beyond its particular facts. Pet. 14-15; *see also Stringer*, 503 U.S. at 228-29 (recognizing that "it would be a mistake to conclude that the vagueness ruling of *Godfrey* was limited to the precise language before us in that case").

The Commonwealth asserts as well that petitioner's conduct "clearly involved" depravity of mind and that "the case for aggravated battery was beyond dispute." Opp. 15-16. The petition, however, showed that the evidence presented below would not have been sufficient to make petitioner eligible for the death penalty under narrowing constructions applied by other states with vileness aggravators. Pet. 26 (noting that there was no evidence that petitioner acted for the sheer pleasure of killing as required by New Jersey's depravity prong); *id.* (noting no evidence of intent to inflict unnecessary pain and suffering as required by South Dakota's aggravated battery prong); *id.* (noting no evidence of a battery separate and distinct from the conduct causing death as required by Georgia). The Commonwealth's brief does not dispute this showing.

The Commonwealth also asserts the "jury's finding that his capital murder of Dana Thrall also constituted torture" is unchallenged. Opp. Br. 13 n.2. In fact, the Commonwealth did not even ask the jury to find torture, App. 62a-67a, and the jury entered a general verdict that does not indicate any such finding. App. 45a. Furthermore, as previously pointed out, because the jury entered a general verdict, petitioner's sentence is tainted if any one of the prongs of the vileness aggravator is unconstitutionally vague. Pet. 15-16.

Finally, the Commonwealth asserts that the Virginia Supreme Court has "narrowly defined" the vileness aggravator. Opp. 16. This assertion is meritless. In the first place, the Virginia Supreme Court's construction was not provided to the jury and is therefore irrelevant. *See Ring v.*

Arizona, 536 U.S. 584 (2002). Furthermore, as the petition showed, Virginia's construction of its vileness aggravator is far broader and vaguer than the constructions adopted by other states with similar aggravators. Pet. 19; *see also* Pet. 16 (noting that the aggravated battery instruction below made that term "even more ambiguous and confusing"). In fact, as *amici* point out, the Virginia Supreme Court has given such an elastic meaning to the aggravated battery and depravity prongs of the Commonwealth's vileness aggravator that these prongs "act effectively as catch-alls, sweeping within their potential scope almost any fact scenario." Brief of *Amici* Nat'l Ass'n of Criminal Defense Lawyers and Virginia Ass'n of Criminal Defense Lawyers at 7-8. Indeed, the murder in *Godfrey* could have been found vile under Virginia's aggravator for any number of reasons. *See id.* at 8-9. Thus, like the Virginia Supreme Court for the last twenty years, the Commonwealth fails to reconcile its vileness aggravator with *Godfrey*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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